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IN THE

Supreme Court of the United States

October Term, 1963

No. 300

REV. L. A. CLARK, ET AL.,
Petitioners,

v.

ALLEN C. THOMPSON, Mayor, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

ALLEN C. THOMPSON, Mayor, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 23, 1963, in the above-entitled cause.

Opinion Below

The order of the United States Court of Appeals for the Fifth Circuit denying a rehearing of its judgment of March 6, 1963 is not reported and is printed as Appendix A, *infra*, at 1a. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit entered on March 6, 1963 is not reported and is printed in Appendix B, *infra* at page 18. The opinion of the United States District Court for the Southern District of Mississippi, Jackson Division, entered on May 16, 1962, is printed in Appendix C, *infra* at page 19.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 23, 1963 (R. 364). Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether Negro petitioners seeking the use of public facilities on a non-segregated basis pursuant to the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States have the right to maintain a class action for other Negroes similarly situated, and whether petitioners are entitled to injunctive relief against state segregation statutes and against the state policy of enforced racial discrimination in public facilities?

Statement

Petitioners filed a complaint in the United States District Court for the Southern District of Mississippi, Jackson Division, on January 12, 1962 (R. 2-13) seeking a declaratory judgment that Sections 4065.3, 2056(7) and 2046.5(1) of the Mississippi Code of 1942, Ann., violate the Fourteenth Amendment of the Constitution of the United States. These statutes are set out in Appendix D. The complaint also sought an injunction against the enforcement of these statutes and of the policy and practice of the respondent state officials which prevent petitioners and others similarly situated from using public recreational facilities on an integrated and equal basis, solely on the grounds of race and color, and which therefore violate the Fourteenth Amendment to the Constitution of the United States and the rights secured by Sections 1981 and 1983 of Title 42, United States Code. Respondents are public officials of

the City of Jackson charged with the enforcement of these statutes. Petitioners prayed that a three-judge court be convened under 28 United States Code, Sections 2281 and 2284, and that the cause be advanced on the docket for a speedy hearing.

On February 2, 1962, respondents moved to dismiss the complaint, and on February 5 moved to dissolve the three-judge court. On February 20, 1962, the court denied respondents' pending motions.

Petitioners amended their complaint as of course on February 16, 1962, dropping one party defendant and substituting another (R. 13-16).

On March 1, 1962, respondents answered the complaint. (R. 16-19) alleging that the constitutionality of the statutes was not the real issue; that the State courts should be allowed to construe the statutes; that some of the respondents were misjoined; and that the amended complaint did not state a cause of action.

On April 19, 1962, the three-judge court was dissolved on the grounds that if the statutes were held to segregate petitioners on the basis of race, they would be so patently unconstitutional that they would not require a three-judge court; or if the statutes were not the crux of the case, a three-judge court would not be proper (R. 20-22).

Trial was held on March 12, 1962. The evidence showed that petitioners are Negroes, citizens of the United States and residents of Jackson. Uncontroverted testimony revealed that Negroes had been refused the right to use the Municipal Library– a library open for white persons only; that a group of Negro college students who attempted to use the facilities in March, 1961, were told to use the Negro library and on their failure to do so were arrested, and charged with breach of the peace (R. 29, 30, 63).

Respondents attempted to show that these students were not entitled to use the Municipal Library because they were not residents of Jackson, Mississippi. The evidence revealed, however, that one of the arrested Negro students was a resident of Jackson; that all had been told to use the Negro library (purportedly subject to the same residential requirements as the Municipal Library); that the rules in respect to residence in Jackson apply only to card-securing privileges, and that it is not the custom of the librarians to inquire of persons who merely want to read or use books of reference in the library, whether they are residents of Jackson (R. 46, 63, 71-72, 86-87). There can be no question but that these persons were not allowed to use the Municipal Library solely because of their race and color.

The evidence further showed that Negroes who had attempted to sit on benches in Livingston Park were arrested (R. 98, 100); those who sought to use the swimming pool and those who sat on benches outside the swimming pool enclosure were arrested (R. 112-114); that the Director of Public Parks had prepared a memorandum showing that public parks, golf courses and auditorium are established exclusively for Negroes and designated as Negro facilities (R. 143-153).

The Chief of Police testified that the arrests made where Negroes attempted to assert their right to free use of public facilities took place because of fear of public disturbance (R. 201). In no instance was anyone arrested for doing anything other than attempting peacefully to use public facilities, a right which is guaranteed by the Constitution of the United States.

On May 16, 1962, the United States District Court handed down its opinion (R. 330-339) holding:

> (1) That this is not a proper class action and no relief may be granted other than that to which the plaintiffs are personally entitled.

(2) That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson.

(3) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

(4) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

On June 8, 1962, petitioners filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit (R. 340) appealing from so much of the judgment entered in this action on May 16, 1962, as follows the words "ORDERED, ADJUDGED AND DECLARED as follows, to-wit:"

(1) That this is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled.

(3) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

As the printing of the record was not completed, petitioners were given a 90-day extension of time to file the record on July 17, 1962 (R. 349).

On March 6, 1963, the court below rendered its decision in this cause, affirming the order of the United States District Court for the Southern District of Mississippi, Jackson Division (R. 355). On March 25, 1963, petitioners filed a Petition for Rehearing in the court below, contending that its decision was in conflict with the rulings of the federal courts and particularly of the United States Court

of Appeals for the Fifth Circuit. On April 23, 1963, the court entered an order without opinion denying the Petition for Rehearing (R. 364).

Whereupon, petitioners bring the cause here, seeking a review by this Court of the judgment and decree of the United States Court of Appeals for the Fifth Circuit.

Reasons for Allowance of Writ

1. The ruling of the United States Court of Appeals for the Fifth Circuit that Negroes discriminated against as a class by the state may not maintain a suit on behalf of other Negroes in the state who are similarly situated, is in direct conflict with the prior decisions of the federal courts.

The question of whether Negroes prevented because of their race from using public recreational facilities can bring a class action was settled in *Kansas City, Mo.* v. *Williams*, 205 F. 2d 47 (C. A. 8, 1953), which reversed a lower court holding. The Court of Appeals said at page 52:

> Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed *on a class basis or as a group policy*, such as a discrimination generally because of race, they are no less entitled to be made the subject of class actions and class adjudication under Rule 23, Federal Rules of Civil Procedure, 28 U. S. C. A., than are other several rights. (Emphasis added.)

In *Gilmore* v. *City of Montgomery*, 176 F. Supp. 776 (M. D. Ala. 1959), another case on exactly this point, Negroes were denied the use of the public parks on a non-segregated basis. This was an action by citizens on behalf of themselves and others similarly situated seeking an injunction against a city ordinance and the policy and practice of denying the use of public parks to plaintiffs and the class

they represented. While the record contained only one instance of arrest for trespassing in the park, the court held that the testimony showed that there was a policy, practice and custom of enforced segregation. Plaintiffs as a class were granted the injunction.

In another recreational facilities case, *Holmes* v. *City of Atlanta*, 124 F. Supp. 290 (N. D. Ga., 1954), plaintiff was held properly to have brought a class suit to determine the right of all Negro citizens to use a public golf course. *Holmes* v. *City of Atlanta*, 350 U. S. 879, established plaintiff's right not merely to an equal golf course but to integrated facilities.

A recent case in the same Circuit as the decision below clearly spelled out the rationale underlying class actions attacking governmentally-imposed segregation. *Potts* v. *Flax*, 313 F. 2d 284 (C. A. 5, 1963). The suit was brought to desegregate public educational facilities. The complaint alleged with precision that it was brought as a class suit under Rule 23 of the Federal Rules of Civil Procedure. The defendant School Board argued that a class action was not appropriate because each student is registered, admitted, assigned, and transferred as an individual. In approving the District Court's ruling that the suit was an appropriate class action, the court held at pages 288-289:

> Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the system-wide policy of racial segregation. It sought obliteration of that policy of system-wide racial discrimination. In various ways this was sought through suitable declaratory orders and injunctions against any rule, regulation, custom or practice having any such consequences. The case therefore had those elements which are sometimes suggested as a distinction between those which are, or are not, appropriate as a class suit brought to vin-

> dicate constitutionally guaranteed civil rights. The pleaded reason for challenging the class suit was, therefore, unfounded . . . By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. *Shelley v. Kraemer*, 1948, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination proscribed by *Bush v. Orleans Parish School Board*, 5 Cir., 1962, 308 F. 2d 491, 499, on rehearing 308 F. 2d 503; see also *Ross v. Dyer*, 5 Cir., 1962, — F. 2d — [No. 19912, Dec. 28, 1962].

The Court also notes:

> Additionally, as we have recently pointed out, a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a class as a class and this is assuredly appropriate for class relief.

See in accord *Sharp v. Lucky*, 252 F. 2d 910 (C. A. 5, 1958); *Johnson v. Yelding*, 165 F. Supp. 76 (N. D. Ala., 1958); *Vann, et al. v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N. D. Ohio, 1953); *Coke v. City of Atlanta, Georgia*, 184 F. Supp. 579 (N. D. Ga., 1960); *Brown v. Board of Education*, 347 U. S. 483; *Orleans Parish School Board v. Bush*, 242 F. 2d 156 (C. A. 5, 1957); *Johnson v. Board of Trustees of University of Kentucky, et al.*, 83 F. Supp. 707 (E. D. Kentucky, 1949); *Wilson v. Board of Supervisors*, 92 F. Supp. 986 (E. D. Louisiana, 1950), aff'd 340 U. S. 909; *Constantine, et al. v. Southwestern*

Louisiana Institute, 120 F. Supp. 417 (W. D. Louisiana, 1954); *Tureaud* v. *Board of Supervisors of Louisiana State University*, 116 F. Supp. 248 (E. D. Louisiana, 1953), aff'd 228 F. 2d 895 (C. A. 5, 1956); *Frazier* v. *Board of Trustees of University of N. C.*, 134 F. Supp. 589 (M. D. N. Car., 1955); *Hawkins* v. *Board of Control*, 162 F. Supp. 851 (N. D. Florida, 1958); *Evers* v. *Dwyer*, 358 U. S. 202.

Only two cases were cited by the court below as purported authority for its ruling. One was the opinion of the United States District Court in the instant case upon which petitioners had brought their appeal and were seeking reversal in the court below, *Clark, et al.* v. *Thompson, et al.*, 206 F. Supp. 539 (S. D. Miss. 1962). Appendix C *infra* at page 19. The other was *Brown* v. *Board of Trustees of La Grange, Ind. School District*, 187 F. 2d 20 (C. A. 5, 1951), which held that segregated schools do not contravene the Fourteenth Amendment, that the courts cannot order a school system to be equalized, and that a Negro school child suffered no deprivation of her civil rights in attending a segregated school; this case is plainly superseded by the decision in *Brown* v. *Board of Education*, *supra*.

The decision below, by granting relief solely to the named plaintiffs in this suit, permits the state to continue its unlawful practice of racial discrimination against other Negro citizens of Mississippi. Cf. *Potts* v. *Flax*, *supra*. These other citizens, who would still be denied the use of public recreational facilities, would each be compelled to institute suit in order to gain individual exemption from state-enforced segregation. Thus, in effect, the decision would introduce an aggravated form of gradualism into the desegregation of public parks and other recreational facilities, in contravention of this Court's ruling in *Watson, et al.* v. *City of Memphis, et al.*, — U. S. —, 31 L. W. 4498 (May 27, 1963), where it was held:

> The rights here asserted are, like all such rights, present rights; they are not merely hopes to some

> future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.

The State of Mississippi may not, either directly or indirectly, defer the rights of its Negro citizens; the decisions of this Court have made clear that the system of enforced racial segregation in public recreational facilities is unlawful. *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (C. A. 4, 1955), aff'd 350 U. S. 877; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971; *Holmes* v. *City of Atlanta, supra.*

2. The refusal of the court below to declare null and void and enjoin the enforcement of statutes of the State of Mississippi which compel segregation in public recreational facilities, contravenes this Court's consistent policy and practice of striking down state regulations based on a racial criterion. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ogama* v. *California*, 332 U. S. 633; *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Brown* v. *Board of Education, supra*; *Browder* v. *Gayle*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala., 1956); *State Athletic Commission* v. *Dorsey*, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. Louisiana, 1958).

Petitioners seek to enjoin the enforcement of Sections 4065.3, 2056(7), and 2046.5(1) of Mississippi Code of 1942, Ann., (set out in full in Appendix D, *infra*), on the grounds that the statutes are unconstitutional and violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Title 42, United States Code, Sections 1981 and 1983.

Section 4065.3 states that the entire executive branch of Mississippi and all persons responsible thereto are "directed and required to prohibit . . . the implementation of

or the compliance with the Integration Decisions of the United States Supreme Court . . . and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in . . . public places of amusement, recreation or assembly."

In spite of the use of the words "lawful, peaceful and constitutional means," the statute then adds immunity to the powers it purports to confer, saying that the statute itself shall be "a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature" which may be brought against the executive officers by any person or any state or any branch of the federal government.

Section 2056(7) makes it a conspiracy to overthrow or violate "the segregation laws of this State" through force, violence "or otherwise." The phrase "or otherwise" is unlimited and embraces peaceful challenges to segregation. This statute attempts to prevent use of public facilities on an integrated basis by acknowledging segregation laws and making disregard of them a criminal offense, and also attempts to block access to the courts to question the constitutionality of this and other segregation statutes.

Section 2046.5(1) on its face gives persons, corporations, managers and employers power to exclude members of the public from "any public business, trade or profession of any kind whatsoever in the State of Mississippi, including . . . public parks and swimming pools." This violates the Fourteenth Amendment, whether the corporations, managers and employees are municipal bodies or officials, or merely the agents of such officials. No state statute may "authorize" a constitutional violation.

These statutes do not make compliance voluntary. Section 4065.3 directs and requires; Section 2056(7) creates a punishable offense; Section 2046.5(1) purports to give public officials or their agents the power to refuse to serve the public.

Respondents claim that these statutes have not been enforced and that therefore there can be no suit to enjoin their future enforcement. A direct threat is not necessary to a finding of an actual controversy. *Eastman Kodak Co.* v. *Velveray Corp.*, 175 F. Supp. 646 (S. D. N. Y., 1959); *Paramount Pictures Corp.* v. *Holden*, 166 F. Supp. 684 (S. D. Calif., 1958); *Simmonds Aerocessories* v. *Elastic Stop Nut Corp.*, 257 F. 2d 485 (C. A. 3, 1958). These cases make clear that the Federal Declaratory Judgments Act should have a liberal interpretation, bearing in mind its remedial character and the legislative purpose of settling uncertain rights where conflicting interests are present. A clear explanation of the purposes of the Act is given by one of the draftsmen: Declaratory Judgments, by Borchard (Banks-Baldwin Law Publishing Co., Cleveland, 1941). He states at page 63 that if a statute passed pursuant to the police power is mandatory and requires little or no fact finding or administrative regulation prior to its enforcement, and if its application to plaintiff's activity is apparent, enactment suffices to create justiciability.

At page 365, Borchard refutes the argument that threat of enforcement is a prerequisite to attack on a statute:

> . . . the threat to enforce a statute, sometimes apparently believed necessary to a challenge of its validity, should play no part in a declaratory action. The requirement of a threat to enforce seems unfounded in any case, and has been disregarded in such cases as *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. A statute is not passed with the expectation that it will not be enforced nor is an attorney-general expected to disregard it.

Great emphasis is placed on the importance to the individual of testing the validity of a governmental restriction before it is applied, and the right to an injunction (p. 966).

> As a rule, the mere enactment of a statute or ordinance imposing restraints on an individual and im-

> plying enforcement by prosecuting officials threatens and hampers the plaintiff's freedom, peace of mind or pecuniary interests, and creates that justiciability of the issue which sustains a proceeding for an injunction and, *a fortiori*, for a declaratory judgment.

Applying this point to constitutionality, Borchard points out, at page 976:

> The experience of many jurisdictions with the declaratory judgment shows that it has been frequently employed for the purpose of obtaining a decision on the challenged power of an officer or administrative body under a statute. The issue generally involves the constitutionality or construction of a statute or ordinance. To enable this question of construction to be determined before the officer acts, is manifestly a public service to everyone concerned.

Where a party's acts come within the terms of a statute, the statute remains an imminent threat to him, and he can properly seek to have its enforcement enjoined under Title 28, United States Code, Section 2281, et seq. *NAACP* v. *Button*, 371 U. S. 415; *NAACP* v. *Patty*, 159 F. Supp. 503 (E. D. Va., 1958), vacated on other grounds *sub nom. Harrison* v. *NAACP*, 360 U. S. 167.

This is not *Poe* v. *Ullman*, 367 U. S. 497, where a statute had been on the books for years, but no action taken to enforce the state policy set forth in the statute. On the contrary, while the statutes under attack have not been enforced, Negroes have been prevented from doing what these statutes condemn—using public facilities on a non-segregated basis.

At the hearing before the District Court for the Southern District of Mississippi on March 12, 1961, uncontroverted testimony revealed that Negroes had been refused the right to use the Municipal Library—a library open for white persons only; that Negro college students who

attempted to use the facilities in March, 1961, were told to use the Negro library and on their failure to do so were arrested, and charged with breach of the peace (R. 29, 30, 63). There can be no question but that these persons were not allowed to use the Municipal Library solely because of their race and color.

It was also shown that Negroes who had attempted to sit on benches in Livingston Park were arrested (R. 98, 100); those who sought to use the swimming pool and those who sat on benches outside the swimming pool enclosure were arrested (R. 112, 114); that the Director of Public Parks had prepared a memorandum showing that public parks, golf courses and an auditorium are established exclusively for Negroes and designated as Negro facilities (R. 143-153).

There was testimony by the Chief of Police that the arrests made where Negroes attempted to assert their right to free use of public facilities took place because of fear of public disturbance (R. 201). There was no showing of any such disturbance. Negroes arrested were merely attempting to exercise peacefully their right to use public facilities. It is clear that police officers are enforcing a pattern of segregation under color of state authority, and that the respondents condone this policy.

The proof clearly entitles petitioners and the class they represent to an injunction against respondents restraining them from the continuation of racial discrimination in respect to the use of any of the public facilities which are named in the instant suit. However, such an injunction alone would not grant to petitioners full relief against deprivation of Fourteenth Amendment rights. Unless the statutes under attack are struck down, petitioners and other Negroes in the state will still be subject to the threat of their enforcement, even if the pattern of segregation re-

vealed in these proceedings is held unconstitutional. Thus, declaring the statutes invalid and enjoining their enforcement is a crucial element in this cause.

Because of the great importance of insuring civil rights and civil liberties, the federal courts have proceeded to give injunctive relief against state legislation, city ordinances, and state administrative rulings where their meaning and effect on the individual is clear. *Gilmore* v. *City of Montgomery, supra*; *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 55 (D. Kan., 1945); *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (D. C. La., 1961); *Tomkins* v. *City of Greensboro, N. C.*, 276 F. 2d 890 (C. A. 4, 1960).

The statutes in question are on their face an explicit deprivation of rights which have long been protected by this Court. *Dawson* v. *Mayor and City Council of Baltimore, supra*; *Brown* v. *Board of Education, supra*. It is respectfully submitted that petitioners are entitled to an injunction against them.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Denial of Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit

(April 23, 1963)

Before:

HUTCHESON and GEWIN, *Circuit Judges*, and HANNAY, *District Judge*.

PER CURIAM:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

APPENDIX B

Judgment of the United States Court of Appeals for the Fifth Circuit

(March 6, 1963)

Before:

HUTCHESON and GEWIN, *Circuit Judges*, and HANNAY, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Rev. L. A. Clark, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Appendix B

Opinion of the United States Court of Appeals for the Fifth Circuit

(March 6, 1963)

Before HUTCHESON and GEWIN, *Circuit Judges*, and HANNAY, *District Judge*.

PER CURIAM: In this case the appellants complain of the judgment of the trial court refusing to grant an injunction and denying relief sought by way of declaratory judgment in an alleged class action in which it was claimed that they, and others similarly situated were denied the use of public recreational facilities in the City of Jackson, Mississippi, solely on the grounds of race and color. Upon a careful review of the record, we find ourselves in agreement with the conclusions reached by the trial court. *Brown v. Board of Trustees of La Grange Ind. Sch. Dist.*, 5 Cir., 1951, 187 F. 2d. 20; *Clark, et al. v. Thompson, et al.*, 206 F. Supp. 539.

The judgment is AFFIRMED

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By G. F. GANUCHEAU
Deputy

New Orleans, Louisiana

April 30, 1963

APPENDIX C

Opinion of the United States District Court for the Southern District of Mississippi, Jackson Division

(May 16, 1962)

Three Negro citizens and residents of Jackson, Mississippi, brought this action to enjoin the alleged enforcement of Sections 2046.5, 2056 and 4065.3 of the Mississippi Code of 1942, Recompiled. The complaint attacks the constitutionality of said statutes. The complaint further alleges that the defendant officials of the City of Jackson have denied plaintiffs the use of public facilities solely on the ground of race. Plaintiffs contend that they have been denied the right to use the public parks, libraries, zoos, golf courses, playgrounds, auditoriums and other public recreational facilities of the City. A three-judge Court was convened under Title 28 U. S. C. Section 2281. A hearing on plaintiffs' motion for a preliminary injunction was consolidated with a hearing on the merits, and defendants' motion to dissolve the three-judge District Court was taken under advisement. After mature consideration, the Court concluded that this was not a proper case for a three-judge Court. — F. Supp. —. Accordingly, an order has been entered herein dissolving the three-judge Court.

Findings of Fact

None of the plaintiffs has been arrested or threatened with arrest under any statute or alleged discriminatory practice attacked in this case. The plaintiffs have not been denied any right, privilege or immunity claimed by them by any of the defendants. Although each of the plaintiffs has been a resident of Jackson for more than 25 years, there is no evidence that they have been denied the right to use any public recreational facility in that city.

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Jackson is a clean, progressive city of approximately 150,000 people, of whom more than 50,000 are Negroes. Jackson has been noted for its low crime rate and lack of racial friction except for the period in 1961 when the self-styled Freedom Riders made their visits. As the city rebuilt from the ashes of the Civil War, its white citizens occupied one area, and its colored citizens chose to live together in another. This custom has continued until today there are large areas of the city occupied entirely by white people and others inhabited exclusively by colored people. As this development took place, the city duplicated its parks, playgrounds, libraries and auditoriums in the white and colored areas. Under these circumstances, members of each race have customarily used the recreational facilities located in close proximity to their homes. The defendants believe that the welfare of both races will best be served if this custom is continued. They do not claim the right to require or enforce separation of the races in any public facility.

The fact that voluntary separation of the races in the use of public facilities has operated smoothly and apparently to the complete satisfaction of all concerned for many years, requires reasonable scrutiny of the evidence offered to show discriminatory action by the defendants. It is worthy of note that there was no evidence of the arrest or threatened arrest of any Negro in Jackson before the Freedom Riders aroused strained racial feelings in 1961. During that period two colored girls testified that they were arrested after they refused a police officer's order that they leave the North State Street library. Neither was a resident of Jackson. They showed no legal right to use any recreational facility in the city. Their exhibition was carefully planned for a month. They notified press and television of their intentions to break the customary

racial use of the library facility. They were met at the library by a large group of newsmen, photographers and members of both races. This Court is convinced from the evidence in this case that this was not a bona fide effort on the part of citizens to use a public facility but, on the contrary, was a deliberate attempt to create racial friction. The same is true of the arrests of a colored boy and girl in Livingston Park. These isolated publicity stunts do not represent the will or desire of the 50,000 Negro citizens of Jackson. The cases arising out of those arrests are now pending in the Courts of the State of Mississippi, and this Court should not attempt to determine the merits of those State Court actions.

The complaint alleged that the plaintiffs represented themselves and "thousands" of Negroes in Jackson and all other parts of Mississippi. It also alleged that the plaintiffs can and will adequately and fairly represent the purported class. Both the right of the plaintiff to represent anyone other than themselves and their ability to adequately and fairly represent any other persons were denied by the defendants. One plaintiff testified that he purported to represent all Negroes in Jackson. Another testified that he purported to represent all Negroes in the United States. The third plaintiff testified that she purported to represent all races of peoples in the world. All of the plaintiffs admitted that they did not discuss this action with or obtain authority to file same from any other member of the purported class. They did not know what other persons agreed or disagreed with the position they were taking in this action. Neither the identity of the purported class nor the right and ability of the plaintiffs to represent same has been established.

The defendants are not enforcing separation of the races in public recreational facilities in the City of Jackson. The defendants do encourage voluntary separation of the races.

Appendix C

Conclusions of Law

In view of the fact that the undisputed evidence shows that the plaintiffs have not been denied any right, privilege or immunity with respect to their use of public recreational facilities, there is serious doubt as to whether this case presents a justiciable controversy, but this Court is giving the plaintiffs the benefit of that doubt and finds that it has jurisdiction of the parties hereto and the subject matter hereof.

This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled. Whether this is a proper class action involves a question of fact. *Flaherty* v. *McDonald*, D. C. Cal., 178 F. Supp. 544. The plaintiffs cannot make this a legitimate class action by merely calling it such. *Pacific Fire Ins. Co.* v. *Reiner*, D. C. La., 45 F. Supp. 703. The burden of proof on this issue was on the plaintiffs. *Oppenheimer* v. *F. J. Young & Co.*, D. C. N. Y., 3 F. R. D. 220. The plaintiffs failed to meet this burden. A class action cannot be maintained where the interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of those whom they purport to represent. *Flaherty* v. *McDonald*, D. C. Cal., 178 F. Supp. 544; *Redmond, et al.* v. *Commerce Trust Co.*, C. C. A. 8th, 144 F. 2d 140; *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham, et al.*, C. C. A. Dist. of Columbia, 175 F. 2d 802; *Kentucky Home Mut. Life Ins. Co.* v. *Duling*, C. C. A. 6th, 190 F. 2d 797; *Advertising Specialty National Association* v. *Federal Trade Commission*, C. C. A. 1st, 238 F. 2d 108; and *Troup* v. *McCart*, C. C. A. 5th, 238 F. 2d 289.

There has been no showing that any of the statutes attacked in this action have been enforced, and, therefore, the validity of said statutes are not involved in this controversy.

Appendix C

Voluntary segregation does not violate the Constitution of the United States which does not prohibit a municipality from permitting, authorizing or encouraging voluntary segregation. *Rice, et al,* v. *Elmore*, 165 F. 2d 387; *Reynolds, et al.* v. *Board of Public Instruction for Dade County*, 148 F. 2d 754; *Ross* v. *Middlebrooks*, 188 F. 2d 308; *Charles Rhea* v. *James E. Edwards*, 136 F. Supp. 671; *Briggs* v. *Elliott*, 132 F. Supp. 776; *Brown* v. *Board of Education*, 349 U. S. 294; *Cohen* v. *Public Housing Administration*, 257 F. 2d 73; *Holland* v. *Board of Public Instruction*, 258 F. 2d 730; *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372; *Rippy* v. *Borders*, 250 F. 2d 690; *Avery* v. *Wichita Falls*, 241 F. 2d 230; *Borders* v. *Rippy*, 247 F. 2d 268; *Browder* v. *Gayle*, 142 F. Supp. 707; *Lassiter* v. *North Hampton County Board of Elections*, 3 L. Ed. 2d 1072; *Williams* v. *Howard Johnson Restaurant*, 268 F. 2d 845; *Eaton* v. *Board of Managers of James Walker Mem. Hosp.*, 261 F. 2d 521; *Civil Rights Cases*, 27 L. Ed. 835; *Cove* v. *Parham*, 176 F. Supp. 242; *Carson* v. *Warlick*, 238 F. 2d 724; *Dawley* v. *City of Norfolk*, 159 F. Supp. 642; *Cooper* v. *Aaron*, 358 U. S. ?, 3 L. Ed. 2d 5; *Butler* v. *Thompson*, 97 F. Supp. 17; and *Williams* v. *State of Mississippi*, 42 L. Ed. 1012.

The three plaintiffs are entitled to an adjudication of their personal claims of right to unsegregated use of public recreational facilities by a declaratory judgment herein.

Under the facts of this case, the plaintiffs are not now entitled to injunctive relief. In so holding, this Court is seeking to observe a vital and fundamental policy which for many years has been pronounced and followed by the United States Supreme Court and by other Federal Courts to the effect that Federal Courts of equity shall conform to clearly defined Congressional policy by refusing to interfere with or embarrass threatened prosecution in State Courts except in those exceptional cases which call for

interposition of a Court of equity to prevent irreparable injury which is clear and imminent. Injunctive relief will never be granted where the parties seeking same have adequate remedies at law., *Douglas* v. *City of Jeanneite*, 319 U. S. 157, 87 L. Ed. 1324; *Cobb* v. *City of Malden*, C. C. A. 1st, 202 F. 2d 701; *Brown* v. *Board of Trustees*, U. S. C. A. 5th, 187 F. 2d 20; and *State of Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 83 L. Ed. 208.

A desire for a sweeping injunction cannot relieve plaintiffs of the obligation to comply with the general rule that they must present facts sufficient to show that their individual needs require injunctive relief. *Bailey* v. *Patterson*, — U. S. —, 7 L. Ed. 2d 512; *McCabe* v. *Atchison T. & S. F. Ry. Co.*, 235 U. S. 151, 59 L. Ed. 169; *Brown* v. *Board of Trustees*, U. S. C. A. 5th, 187 F. 2d 20; and *Kansas City, Mo., et al.* v. *Williams, et al.*, U. S. C. A. 8th, 205 F. 2d 47.

The Supreme Court of the United States, in the case of *Bailey, et al.* v. *Patterson, et al.*, — U. S. —, 7 L. Ed. 2d 512, held that the issuance of an injunction was an extraordinary and unusual writ. This, of course, does not announce any new law. The granting of an injunction is discretionary and dependent upon the facts of each case. It should be granted with great caution, care and deliberation on the part of the trier of the facts, and the power to issue injunctions should not be lightly indulged in, but exercised sparingly, after thoughtful deliberation and the presence of an urgent necessity. See 28 *American Jurisprudence, Injunctions*, Section 25, p. 515. Quoting briefly from that authority, it lays down the rule as follows:

> "The relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury."

The Court of Appeals of this Circuit in the case of *Reliable Transfer Company* v. *Blanchard*, 145 F. 2d 551, spoke as follows:

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> **". . . It is Hornbook law that courts of equity exercise discretionary power in granting or withholding of their extra-ordinary remedies, and that although this discretionary power is not restricted to any particular remedy, it is particularly applicable to injunction, since that is the strong arm of equity, and calls for great caution and deliberation on the part of the Court."**

The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They know now what the law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads.

Neither the facts in the present case nor the exigencies of the situation are sufficient or urgent enough to require the granting of an injunction.

Although no injunctive relief should now be granted, this Court should retain jurisdiction over this action and each of the defendants for such further orders and relief as may subsequently be appropriate.

Order in accord herewith this 16th day of May, 1962.

S. C. Mize,
Chief Judge

Appendix C:

Declaratory Judgment

It is ordered, adjudged and declared as follows, to wit:

(1) That this is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled.

(2) That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson.

(3) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

(4) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

Ordered, adjudged and declared, this 16th day of May, 1962.

S. C. Mize,
United States District Judge.

APPENDIX D

SECTION 2046.5(1) OF MISSISSIPPI CODE OF 1942, ANN. (1956)

Section 2046.5. Business customers, patrons, or clients—right to choose—penalty for violation.

1. Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barbershops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; provided, however, the provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

SECTION 2056(7) OF MISSISSIPPI CODE OF 1942, ANN. (1954)

Section 2056. Conspiracy.

If two (2) or more persons conspire either:

(7) To overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise;

. . . such persons, and each of them, shall be guilty of a misdemeanor, and, on conviction, shall

be fined not less than twenty-five dollars ($25.00), or shall be imprisoned not less than one month or more than six (6) months, or both.

SECTION 4065.3 OF MISSISSIPPI CODE, ANN. (1956)

§ 4065.3. Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education, and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mis-

sissippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873) and of May 31, 1955 (349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083), and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature, which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, the State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.

Office Supreme Court, U.S.
FILED
NOV 7 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 300

REV. L. A. CLARK, ET AL., *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, ET AL., *Respondents.*

REPLY TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 300

REV. L. A. CLARK, ET AL, *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, ET AL, *Respondents.*

REPLY TO PETITION FOR WRIT OF CERTIORARI

In response to the request of the Court that Respondents reply to the Petition for Writ of Certiorari, we submit the following brief. In so doing, we will consider and discuss particularly the case of *Frasier* v. *Board of Trustees*, 134 F.Supp. 589, affirmed 350 U.S. 979, 100 L.Ed. 848, as requested by the Court, and will point out to the Court that said case has no application to a decision of this litigation and in that case, unlike here, there was a proper class action and proper ground for injunctive relief.

Decisions Below

This action was brought in the District Court for the Southern District of Mississippi by three plaintiffs: Reverend L.A. Clark, Mary A. Cox and W.R. Wren, against the Mayor and Commissioners, Chief of Police, Director of Parks and Chairman of the City Library Board of the

City of Jackson, Mississippi. The complaint alleged that the three plaintiffs were being deprived of constitutional rights to the use without discrimination on the ground of race of public recreation facilities and public library facilities in the City of Jackson and that these officials by the enforcement of three alleged unconstitutional statutes of the State of Mississippi had deprived plaintiffs and members of their class of the rights of undiscriminatory use of such public recreation facilities and public library facilities.

Plaintiffs sought declaratory relief and injunctive relief for and on behalf of themselves and "on behalf of thousands of Negroes in Jackson and all other parts of Mississippi who are similarly situated because of race and color."

A three-judge court was convened and then dissolved on the ground that if the State statutes were construed to deny use of public recreational facilities on an integrated and equal basis, the statutes would be plainly unconstitutional and would not require a three-judge court; but that plaintiffs' counsel had admitted they were actually attacking a pattern of racial discrimination rather than the constitutionality of statutes, and that for this reason also a three-judge court was unnecessary. See Opinion 204 F.Supp. 30.

The decision of the single District Judge is found 206 F.Supp. 539. The decision of the District Judge was that in view of the facts ("None of the plaintiffs has been arrested or threatened with arrest under any statute or alleged discriminatory practice attacked in this case. The plaintiffs have not been denied any right, privilege or immunity claimed by them by any of the defendants . . . there is no evidence that they have been denied the right to use any public recreational facility in that city."), that this was not a proper class action and that no relief could

be granted other than to the plaintiffs personally. The Court then held that even though no class action could be brought the three plaintiffs are entitled to an adjudication of their personal claims of right to unsegregated use of public recreation facilities by declaratory judgment and a declaratory judgment to that effect was entered. The Court held however that no injunctive relief would be granted to the three plaintiffs personally in that under the facts the Judge deemed it unnecessary and not required by the individual needs of the plaintiffs.

The decision of the District Judge was affirmed by the Court of Appeals of the Fifth Circuit, the decision appearing 313 F.2d 637, the Court adopting the opinion of the District Court.[1]

Statement

The finding of the Trial Judge that none of the plaintiffs had themselves been denied any right, privilege or immunity claimed by them or denied any right to use any public recreational facility in the City of Jackson was not only amply supported by the evidence but was undisputed and was based upon the testimony of the plaintiffs themselves. The same is true with reference to the finding of fact that the plaintiffs themselves had been neither arrested or threatened with arrest under any statute nor the victims of any alleged discriminatory practice of the City.

Petitioners here do not allege otherwise but do not frankly state to the Court that these were the facts in this case. They state that "Negroes" had been refused the use of recreational facilities in the City of Jackson, but at no time state that plaintiffs had been refused the right of use of any recreational facilities and do not state to the

[1] On appeal to the Court of Appeals there was no assignment of error for the dissolving of the three-judge court and Petitioners have not and are not now complaining thereof.

Court that they admitted in the trial court that they had not been so refused the use of any facility.

We refer the Court to the record: Petitioner Clark admitted that he had never been arrested or threatened with arrest under any of the statutes complained of and that he had never tried to use any of the facilities involved and had never been prevented by the defendants from using any City facilities. (R. 220-244) Mary A. Cox testified to the same effect. (R. 251-277) W.R. Wren testified to the same effect. (R. 283-310)

Nor does the record reflect that any other Negroes were refused use of such facilities except in the case of a violation of the Breach of the Peace Statutes of the State and there had been no arrests save under the Breach of the Peace Statutes. The only evidence relied on by Petitioners to establish any discrimination against any one was that: (1) nine students, acting in concert to provoke an incident, were arrested at the public library on March 27th, 1961; (2) a group of two persons were arrested at the Municipal Zoo on June 6th, 1961, and (3) a group of four persons were arrested near a park swimming pool on July 5th, 1961. These other Negroes so arrested frankly admitted that they were arrested for a violation of the Breach of the Peace Statutes and that charges against them were still pending in the State courts. (R. 42-209, 97-201, 112-114, 122)

The testimony of the arresting officers in each of these three incidents was that they had grounds and reasons to and did believe that trouble was imminent unless the cause of the trouble was removed. (T. 52-3, 56, 196-7 202, 205-7)

The District Court granted personal relief to the individual plaintiffs. After holding that "this is not a proper class action and no relief may be granted other than that to which the plaintiffs are personally entitled," the Court

specifically declared "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." The Court then retained jurisdiction over the action for any further orders or relief that might be necessary. (R. 330-339)

The Court in denying injunction relief to the plaintiffs exercised its discretion in holding that it was unnecessary and that the individual defendants were "all outstanding high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein . . . They will conform to the ruling of this Court without being coerced so to do by an injunction." And the Court further held that plaintiffs had not presented facts sufficient to show their individual needs required injunctive relief (206 F.Supp. 539).

Questions Presented

Petitioners have presented not one but two separate and distinct questions which the Court should separately consider and decide. These questions are stated in the Petition for Writ of Certiorari herein on page 2 thereof as follows:

> "(*1*) Whether Negro petitioners seeking the use of public facilities on a non-segregated basis pursuant to the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States *have the right to maintain a class action* for other Negroes similarly situated, *and* (*2*) whether petitioners are entitled to *injunctive relief* against state segregation statutes and against the state policy of enforced racial discrimination in public facilities?"[2]

This is in accord with the grounds of appeal from the District Court to the Fifth Circuit. Petitioners appealing

[2] The italics and numbers added by Respondents.

from the following and only the following parts of the final order:

> "(1) That this is not a proper class action and no relief may be granted other than that to which the plaintiffs are personally entitled.
>
> (3) That the *plaintiffs* are not now entitled to any injunctive relief . . ."[3]

Different law and different facts are applicable to these two issues raised in the Court below and raised here. We shall discuss them separately.

POINT I

This Is Not a Proper Class Action and the Courts Below Committed No Error in Refusing to Grant Any Other Relief Than That to Which the Plaintiffs Were Personally Entitled.

As stated, it was undisputed that none of the three Petitioners here, plaintiffs below, were ever arrested or even threatened with arrest under any of the statutes complained of and moreover, that they had never attempted in any way to use the public facilities involved nor had they ever been refused at any time any right to use any public facilities. Therefore, if other Negroes in the City of Jackson were discriminated against by the City Officials either by enforcement of any statutes or by any discriminatory practice or policy, then plaintiffs are not a member of the class so discriminated against. A plaintiff or group of plaintiffs cannot bring a class suit unless they are a member of the class discriminated against by having been themselves discriminated against, i.e. one of those discriminated against.

[3] Petition for Writ of Certiorari, page 6.

Prior to citation of authorities relied on to support the above statement, we first point out the Petitioners have not cited a single authority justifying a class suit where the plaintiffs themselves had not been personally discriminated against.

Board of Trustees of the University of North Carolina v. *Fraiser*, 350 U.S. 979, 100 L.Ed. 848, affirming per curiam *Fraiser* v. *Board of Trustees*, 134 F.Supp. 589, referred to in the request for this Reply, was a clear case of a suit by persons who had themselves been discriminated against and who, therefore, could bring a class action. The alleged discrimination against the Negroes was that they were not allowed to attend the undergraduate school of the University of North Carolina. In the Opinion in the lower Court it is stated: "The plaintiffs made formal application for admission to the undergraduate school of the University on April 19th, 1955, and accompanied their application with a record of their academic achievements, character and personal references as required by the rules of the University. On April 27th, 1955, they received identical letters from the Director of Admissions in which they were told that the Trustees of the University had not changed the policy of admission of Negroes who were eligible to make application for graduate and professional studies not offered at a Negro college in the state, but were not eligible at that time to apply for admission to the undergraduate school. Thereupon the plaintiffs requested the University to reverse its policy of discrimination against Negroes and the Board of Trustees in reply, on May 23rd, 1955, reaffirmed its policy by passing the following resolution . . ." said resolution denying them the right to enter the undergraduate school. The Court did no more than hold that plaintiffs who were Negro youths who had been denied admission to the undergraduate school of the University and

thus personally denied their rights under the Fourteenth Amendment could bring a class action.

This is true, as each of the cases relied on by Petitioners to attempt to justify a class action:

For example, in *Kansas City* v. *Williams*, 205 F.2d 47, affirming 104 F.Supp. 857: "On June 20th, 1951, plaintiffs, Negroes, of full age, good character and sound health, went to the Swope Park swimming pool during the hours when said pool was open and being used and enjoyed by white persons, tendered their admission tickets entitling them to enter said pool, and sought to gain admission to the pool to swim. They were denied admittance to such pool for swimming by employees of the defendant City, in charge of the operation thereof solely on account of their race and color."[4] The Court thus held that it was a proper class action but carefully pointed out: "It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply 'because someone else may be hurt' . . . But *where he is able to establish his right to individual relief on this basis*, he may also under certain conditions, ask that the benefit of that adjudication be extended to others, where they constitute a class . . . where they are so numerous as to make it impracticable to bring them all before the court . . ."[5]

For example in *Holmes* v. *City of Atlanta*, 124 F.Supp. 290, affirmed 223 F.2d 93, reversed 350 U.S. 879, 100 L.Ed. 776: "Plaintiffs, who at all times met all lawful requirements necessary for admission to play golf, on July 19, 1951 requested defendants to grant them permission to play golf on the Bobby Jones Golf Course . . . whereupon plaintiffs were denied permission to and the right to play golf"

[4] Quotation from opinion in 104 F.Supp. 857

[5] Quotation from 205 F.2d 47.

as requested, such denial being upon the sole basis of the race and color of the plaintiffs."

Or for example, in *Potts* v. *Flax*, C.A. 5, 313 F.2d 284, affirming 204 F.Supp. 458, the suit was brought by six Negro school children of Herbert Teal and one Negro child of Flax by their respective parents as next friend, the Court pointing out: "... The children named in the complaint were refused enrollment at the school nearest their respective homes solely on the ground of their race and color."[7] The decree granting class relief was not challenged on the ground that plaintiffs were not members of the class. It was merely challenged on the ground that "Such matters are not ... determined on a class basis since the Board must register each child one at a time as individuals."[8] Class decree was thus challenged on the basis of "... the right to bring a class action by reason of the intrinsic nature of the rights involved ..." as in school cases. The Court merely held: "The *pleaded* reason for challenging the class suit was, therefore, unfounded." The issue here was not presented there and could not be presented because the plaintiffs were members of the class.

Each and every other case relied on by Petitioners as sustaining a class action can be similarly distinguished, i.e. in each and every case the plaintiffs themselves were members of the class. Here they were not.

The decision of the Courts below denying any class relief on the ground that plaintiffs, Petitioners here, had not been personally discriminated against and were not members of the class for which relief was sought, is in strict

[6] Class relief granted in the lower courts was only for equal use of existing facilities; it served to preclude the right to use any public facility.

[7] Quoting 204 F.Supp. at 460.

[8] 313 F.2d at 288.

accord with decisions of this Court and of every other Court of Appeals where the same situation existed.

To reverse this case on the ground that no class relief was granted would necessitate the specific overruling of *McCabe v. Atchison, etc.*, 59 L.Ed. 169; 235 U.S. 151, where action was brought by a few Negroes for a sweeping injunction against railroad carriers preventing them generally from complying in any way with the state separate coach law. The complaint alleged that the defendants were: "... making distinctions in the civil rights of your orators and of all other persons of the Negro race and persons of the white race in the conduct and operation of its trains ..." Complainant alleged that its purpose was to avoid a multiplicity of suits "... there being at least fifty thousand persons of the negro race in the state of Oklahoma who will be injured and deprived of their civil rights." The lower court dismissed the bill. The Supreme Court in affirming the lower court's decree stated:

> "... The complainant cannot succeed because some one else may be hurt. *Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant, not to others, which justifies judicial intervention.* Williams v. Hagood, 98 U.S. 72, 74, 75, 25 L. ed. 51, 52; Marye v. Parsons, 114 U.S. 325, 328, 329, 29 L. ed. 205, 206, 5 Sup. Ct. Rep. 932, 962; Tyler v. Registration Ct. Judges, 179 U.S. 405, 406, 45 L. ed. 252, 253, 21 Sup. Ct. Rep. 206; Tarpin v. Denon, 187 U.S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Davis & F. Mfg. Co. v. Los Angeles, 189 U.S. 207, 220, 47 L. ed. 778, 781, 23 Sup. Ct. Rep. 498; Hooker v. Burr, 194 U.S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Brax-

tee County Ct. v. West Virginia, 208 U.S. 192, 197, 52 L. ed. 450, 451, 28 Sup. Ct. Rep. 275; Collins v. Texas, 223 U.S. 288, 295, 296, 56 L. ed. 439, 443, 444, 32 Sup. Ct. Rep. 286.

> "... It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; or that any one of the complainants has ever requested that accommodations be furnished to him in any sleeping cars, dining cars, or chair cars; or that any of these five companies has ever notified any one of these complainants that such accommodations would not be furnished to him, when furnished to others upon reasonable request and payment of the customary charge. Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. *The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule, that the complainant must present facts sufficient to show that his individual need requires the relief for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.*" (emphasis ours)

The latest expression of this Court is in *Bailey v. Patterson*, 368 U.S. 346, 7 L.Ed.2d 332, and *Bailey v. Patterson*, 369 U.S. 31, 7 L.Ed.2d 512. In the first opinion on a motion

for an injunction pendente lite to stay the prosecution of a number of criminal cases in Mississippi courts the Court denied the same on the primary ground that there was no justification for the extraordinary remedy and two concurring judges also pointed out that "... the three movants are not themselves being prosecuted or threatened with prosecution in Mississippi ..." In the second decision in overruling the decision of the three-judge court that the case should be delayed pending a state construction of the statutes involved the Court held that the appellants lacked "standing" to enjoin criminal prosecution under Mississippi Breach of the Peace Statutes in that "They cannot represent a class of whom they are not a part." The Court then merely held that they had standing to enforce their personal rights as passengers and remanded the cause to the District Court for disposition "of the appellants' 'claims of right to unsegregated transportation service'", i.e. their personal claim of right to unsegregated service.

Note the difference between the order in the *Bailey* case and the order in the case of *Turner v. Memphis*, 7 L.Ed.2d 762, 369 U.S. 350, where the plaintiff was "a Negro who was refused non-segregated service in the Memphis Municipal Airport restaurant" who brought the action for himself and other Negroes similarly situated. There where the plaintiff was a member of the class, the order of this Court read "... the case is remanded to the District Court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained of."

Other Federal Court decisions holding that a party cannot obtain injunctive relief on behalf of a class where he is not a member of the class and has not been personally discriminated against or deprived of the rights sought to be remedied in the litigation on behalf of the class include:

Dauley v. City of Norfolk, Virginia, C.A. 4, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.Ed.2d 636, 359 U.S. 935;

Braxton v. Board of Trustees of La Grange Ind. Sch. Dist., C.A. 5, 187 F.2d 20;

Kansas City v. Williams, C.A. 8, 205 F.2d 47 (rule stated);

Hackett v. Illinois Central Railroad, C.A. 7, 278 F.2d 529;

Rock Drilling, Blasting, etc. v. Mason & Hanger Co., C.A. 2, 217 F.2d 687;

Carroll v. Associated Musicians of Greater New York, C.A. 2, 316 F.2d 574;

Johnson v. Craven, 128 F.Supp. 230;

Anderson v. Kelly, 32 F.R.D. 355;

Conley v. Gibson, 29 F.R.D. 519.

A reversal of this case would be in conflict with all of the above authorities and would not be justified by or supported by any Federal case.

There is no hardship in the rule so limiting class suits, the limitation being bedded in equitable principles and class suits being a creature of equity. Here Petitioners not only were not members of the purported class allegedly discriminated against but each admitted that they had filed the suit entirely on their own initiative and had talked to no one about the litigation except the other plaintiffs and did not know to what extent other members of the purported class agreed or *disagreed* with them. They were pure volunteers. Nor is there any hardship on persons discriminated against on account of this rule, i.e. it would not require individual suits in each instance. A class suit could be brought by one individual discriminated against by being personally denied rights under the Fourteenth Amendment.

Point II

Petitioners Personal Rights to Non-Discriminatory Use of the Recreational Facilities of the City of Jackson Were Fully Protected by the Judgment of the Court Below.

The court below not only found as a fact but specifically ordered "that each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." At the same time the court retained jurisdiction of the entry of such further orders and relief as might be subsequently appropriate. This order was entered on May 16, 1962. No requests have been made of the court for any further orders or relief.

Petitioners were told by the District Court not to be entitled to injunctive relief on four different grounds: (1) An injunction should only be granted with great caution, care and deliberation and the power to issue injunctions should not be lightly indulged in but exercised sparingly and only where relief is necessary to prevent great and irreparable injury; which conditions did not exist; (2) An injunction should not issue where plaintiffs do not present facts sufficient to show that their *individual needs require* injunctive relief; which did not exist; (3) It is the policy of the Federal courts to refuse to interfere with or embarrass threatened prosecution in state courts except in exceptional cases to prevent irreparable injury which is clear and imminent; not present here; (4) Granting of an injunction is within the sound discretion of the trial judge and he was exercising this discretion in refusing this extraordinary remedy because of the high character of the defendants and his firm belief that they would conform to the ruling of the court without being coerced to do so by injunction and belief that the court should place trust

in the Respondents to obey the mandate of the court without an injunction hanging over their heads."

The discretion exercised by the trial judge here in denying injunctive relief is reviewable only for abuse of discretion and for the reasons given there was no abuse of discretion particularly where the injunction sought to control State officers in the conduct of their office and to control by injunction the general conduct of a political subdivision.[10] *Brotherhood* v. *Missouri-Kansas-T. R. Co.*, 4 L.Ed. 2d 1379, 363 U.S. 528; *Pear* v. *Cox*, C.A. 5, 190 F.2d 123 cert. den. 96 L.ed. 671; *Barnes* v. *City of Gadsden*, C.A. 5, 174 F.Supp. 64, affirmed 268 F.2d 566, cert. den. 4 L.ed.2d 186; *Beales* v. *Huff*, C.A. 9, 144 F.2d 428; *Hecht Company* v. *Bowles*, 321 U.S. 321, 88 L.ed. 754; *Reliable Transfer* v. *Blanchard*, C.A. 5, 145 F.2d 551; *Spitalain Motor Sales* v. *Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45, 85 L.ed. 577; *Sterling* v. *Constantin*, 287 U.S. 378, 77 L.ed. 375; *Daniels* v. *City of Norfolk*, C.A. 4, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed. 2d 636.

There is no question of a reversal of exercise of discretion of the trial judge in denying an injunction in the case of *Board of Trustees* v. *Fraser*, 100 L.ed. 848, 350 U.S. 979, affirming *Fraser* v. *Board of Trustees*, 134 F.Supp. 589. There the trial judge exercised his discretion to *allow* the injunctive relief.

Moreover, not only can a class suit not be brought unless the plaintiffs themselves were members of the class and had been actually discriminated against or themselves deprived of constitutional rights but the plaintiff cannot even for himself without seeking a class suit, obtain

[10] 204 F.Supp. 30.

[10] Criticized in *Brown* v. *Board*, C.A. 5, 187 F.2d 20.

injunctive relief where plaintiff himself had not been deprived of constitutional rights. *Pidcoke* v. *Ullman*, 318 U.S. 44, 87 L.ed. 603; *Poe* v. *Ullman*, 367 U.S. 497, 6 L.ed.2d 989;[11] *Toomer* v. *Witsell*, 334 U.S. 385, 92 L.ed. 1460, rehearing denied 93 L.ed. 389; *Briggs* v. *Ramsey*, C.A. 8, 185 F.2d 225. The rights under the Fourteenth Amendment are individual or personal rights and an individual is not entitled to injunctive relief, under the above authorities, merely because someone else has been deprived of rights under the Fourteenth Amendment, i.e. cannot vindicate the constitutional rights of some third party. See *Joint Anti-Fascist Refugee Com.* v. *McGrath*, concurring opinion, in 341 U.S. 123, 95 L.ed. 817. An individual cannot challenge the constitutionality of a statute unless he can show that his own constitutional rights are infringed. *Rode* v. *Barrett*, 344 U.S. 583, 97 L.ed. 567; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U.S. 571, 59 L.ed. 364; *New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 51 L.ed. 415; *Erie R. Co.* v. *Williams*, 233 U.S. 68, 58 L.ed. 1155.

This question also, of course, was not involved in *Board of Trustees* v. *Fraiser*, 350 U.S. 979, 100 L.ed. 848, affirming 134 F.Supp. 589, because, as stated, plaintiffs there had been personally discriminated against and their individual constitutional rights had been violated; not true here.

Petitioners do not attempt to evade the applicability of the above rule insofar as any injunctive relief to the individual petitioners is concerned against the acts of state officers in generally enforcing racial segregation in public facilities or any general state policy of enforcing such racial discrimination. Instead Petitioners merely fall back on the very limited exception to the rule denying injunctive relief against the enforcement of state criminal statutes

[11] See concurring opinion of Frankfurter, Warren, Clark and Whittaker at page 997.

to the effect that a plaintiff does not need, under some limited circumstances, wait to be actually arrested under criminal statutes to obtain injunctive relief.

However, this exception to the rule is limited to instances where a party's acts clearly come within the terms of the criminal statute and the enforcement thereof against him is threatened and he is in clear and imminent danger of immediate arrest and the penalty of the statute is so severe that he should not be required to obtain relief to incur this grave imminent danger.

Cases so limiting this exception and *refusing to apply it include: Poe v. Ullman*, 6 L.ed.2d 512, 367 U.S. 497; *Baileu v. Patterson*, 7 L.ed.2d 332, 512, 368 U.S. 346, 369 U.S. 31; *American Federation of Labor v. Watson*, 80 L.ed. 873, 327 U.S. 582; *Spielman Motor Sales Co. v. Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Stefanelli v. Minard*, 86 L.ed. 138, 342 U.S. 117; *Bradford v. Hart*, C.A. 5, 284 F.2d 722; *Empire Pickwick Distributing Co. v. City of Fort Worth*, C.A. 5, 273 F.2d 529.

Here not only were Petitioners never arrested or threatened with any arrest and were not ever in danger of any arrest under the criminal statutes here complained but also *no persons* were ever arrested under the statutes complained of and they had never been enforced against anyone. Nor had their enforcement ever been suggested, threatened or imminent. The only arrests of any persons were under the Mississippi Breach of the Peace Statutes, not under attack here.

Under no circumstances will a Federal court enjoin the enforcement of Breach of the Peace Statutes where there would be diverse issues and different questions of fact in each such enforcement and where a Federal court could not determine in advance under what circumstances and conditions enforcement of the Breach of the Peace Statutes

would be deemed to deny constitutional rights. *Douglas* v. *Jeanette*, 319 U.S. 157, 87 L.ed. 1324. The right of officials of a state to prevent breaches of the peace cannot be denied. *Thornhill* v. *Alabama*, 84 L.ed. 1093, 310 U.S. at 105. See *United Electrical Workers* v. *Baldwin*, 67 F.Supp. 235.

Petitioners rely only on *NAACP* v. *Button*, 371 U.S. 415, 9 L.ed.2d 405.[12] This is merely a clear case of the exception to the rule against enjoining enforcement of state criminal statutes. Not only were the acts of the NAACP clearly within the terms of the criminal statute involved but they were violating and intended to continue a violation thereof, and the threat and danger of immediate arrest thereunder was clear and imminent, i.e. the danger was so clear and grave that it would have prevented the exercise of constitutional rights even without enforcement because the NAACP could not afford to test its constitutional rights by the incurring of such grave criminal liability.

No such facts exist here. In the lower court these Petitioners frankly conceded that none of the three statutes complained of had ever been enforced and that they sought injunctive relief against the City officials only from enforcing a pattern of racial discrimination. That court specifically found that: "Moreover, viewed most favorably to the plaintiffs, the evidence does not indicate that the discriminatory denial of the use of these public facilities has been on the basis of any one or more or all of such statutes."[13]

As a matter of fact here none of the Petitioners' acts did or *could* come within the terms of the three statutes

[12] Companion case is *NAACP* v. *Patty*, 159 F.Supp. 503, vacated on other grounds, 360 U.S. 167.

[13] 204 F.Supp. 31.

complained of. *Section 1065.5* [14] is applicable only to executive officers of the state, not Petitioners.[15] *Section 2046.5* [14] is only applicable to private persons engaged in a business, trade or profession in Mississippi where the business is open to the general public and no acts of Petitioners did or *could* come within the terms of that statute.[15] Section 2056(7) [14] merely makes it a crime for two or more persons to conspire "to overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise *et. al.*". This necessarily limits the crime to conspiracy to overthrow such laws through some unlawful means or criminal acts under the doctrine of ejusdem generis. *Gallia* v. *Stewart*, Miss., 174 So. 559; *State* v. *Russell*, Miss., 187 So. 540.

Thus Petitioners here cannot enjoin the enforcement of these criminal statutes against them. Petitioners cite no authority justifying the enjoining of the City officials from enforcing any policy of racial segregation in public facilities against Petitioners, who have never themselves been discriminated against. We therefore submit that Petitioners have shown no right to have this Court reverse the Court in denying Petitioners individual injunctive relief, Petitioners rights of non-discriminatory use of public facilities never having been questioned or threatened.

Conclusion

In direct response to the request of the Court for a discussion of *Board of Trustees of the University of North Carolina* v. *Fraser*, 350 U.S. 979, 100 L.Ed. 848, affirming per curiam *Fraser* v. *Board of Trustees*, 134 F.Supp. 589,

[14] See Appendix D of Petition for Writ of Certiorari here.

[15] Not a criminal statute.

we again submit that this decision is totally inapplicable here and point out:

(1) That case held that a three-judge court was proper. Here a three-judge court was convened and dissolved and Petitioners did not below or do not now complain thereof or assign the dissolution of the three-judge court as error.

(2) That case was a proper instance of a class action the plaintiffs being Negro youths who had made formal application for admission to the undergraduate school of the University, showing their qualifications to attend such school, and who on being denied admission, requested a reconsideration thereof and who were actually refused admission to the school.

(3) The defendants in that case had actually enforced against the plaintiffs a resolution of the Board of Trustees, made under its statutory rule making power, denying any Negro admission to the undergraduate school of the University, which regulation the Court held "must be considered a 'statute' ".

(4) This Court affirmed the discretion of the trial judge in granting injunctive relief and was not asked to reverse the exercise of discretion by the trial judge.

(5) Injunctive relief was limited to an injunction against excluding Negroes "as a class" on the sole basis of race, and specifically reserved the right of the University to determine individual rights to attendance in the undergraduate school, i.e. it limited the injunction against the defendants to forbidding it to discriminate solely and only on account of race or against Negroes as a group reserving to the University the right to determine whether a particular Negro was eligible and did not require the admission of all Negroes as such regardless of any other ques-

tion. Here Petitioners argue against any reservation of the right in Respondents to determine when any acts of Negroes attempting to use public facilities constitute a breach of the peace.

We therefore respectfully submit that the Petition for a Writ of Certiorari should be denied.

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